Supreme Court, U.S.
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No. 92-1753

In The

Supreme Court of the United States

October Term, 1992

ROBERT CHARLES ROOS IV,

Petitioner,

vs.

BANCFIRST OF SULPHUR, OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a creditor violate the automatic stay by seeking judgment in state court against a partnership in which a bankruptcy debtor is a general partner, particularly where the creditor expressly notifies the court that the debtor is in bankruptcy and that the action is stayed against the debtor?

2. Can a debtor successfully move to vacate judgment on grounds of alleged stay violations over three years after judgment is awarded when the debtor failed to raise timely alleged violations of the automatic stay in the state court proceeding in which the complained-of judgment is taken, failed to appeal that judgment, and failed to raise timely the alleged stay violations in the bankruptcy court?

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The September 30, 1986, judgment of the District Court of Murray County, Oklahoma, is not reported. *See*, Appendices A and B.

STATUTORY PROVISIONS

Rule 13(b) of the Rules for the District Courts of Oklahoma provides:

> If the adverse party or parties wish to oppose the granting of the motion [for summary judgment], they shall serve on the moving party and file with the court clerk within fifteen days after service of the motion a concise written statement of the material facts as to which he or they contend a genuine issue exists and the reasons for denying the motion.

Bankruptcy Code § 350(b), 11 U.S.C. § 350(b), provides:

> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

STATEMENT OF THE CASE

On July 26, 1985, First Oklahoma Bank & Trust Company of Sulphur, Oklahoma, predecessor to Respondent, BancFirst of Sulphur, Oklahoma, ("Respondent") instituted an action in the District Court of Murray County, Oklahoma, ("Murray County Action") seeking to recover

on a promissory note. The initial defendant was Robert Charles Roos III ("Roos III") in his capacity as trustee of the Ruby Louise Roos Trust, the Robert Charles Roos IV Trust, and the Elizabeth Ann Roos Trust ("Trusts"). Roos III had also individually guaranteed the promissory note.

Subsequent discovery revealed that the Roos Trust ("Roos Trust") had received the benefit of the loan proceeds. Roos Trust's federal income tax returns identified its partners as three individuals: Ruby Louise Roos Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman. Based upon this information, Roos Trust was added as a party defendant. At the same time, Roos III was also added as a party defendant based on his personal guaranty.

Roos Trust moved for summary judgment on September 12, 1986, and a hearing was set for September 30, 1986. On September 29, 1986, Respondent filed and served its response to the Roos Trust motion for summary judgment and a cross-motion for summary judgment against Roos Trust and Roos III. At the September 30, 1986, hearing, Respondent was granted judgment on its claims against Roos III individually and in his capacity as trustee. However, contrary to the assertion of Petitioner, summary judgment was not denied as to the liability of Roos Trust. Rather, the court offered the parties the opportunity to submit further authorities and amendments to pleadings on the liability of Roos Trust. Appendix A, at App. 1-App. 2; Appendix B, at App. 5. The additional time permitted Roos Trust the fifteen-day response period established by Rule 13(b) of the Rules for the District Courts of Oklahoma.

On February 6, 1987, Petitioner and his wife filed for relief under Chapter 12 of the Bankruptcy Code. Respondent filed a proof of claim in Petitioner's Chapter 12 case on March 17, 1987, asserting Petitioner's contingent liability for the debt of Roos Trust which Respondent sought to enforce in the Murray County Action.

After Petitioner's Chapter 12 bankruptcy was filed, on December 16, 1987, Respondent filed its "Motion for Disposition of Pending Motion for Summary Judgment" ("Disposition Motion") in the Murray County Action. This was the only action Respondent took in the state court case during the pendency of Petitioner's bankruptcy case. Respondent hoped to obtain judgment against Roos Trust, a partnership which was not in bankruptcy. In the Disposition Motion, Respondent stated:

> That Charles Roos, IV [Respondent] has filed Chapter 12 Bankruptcy in Case No. 87-00148-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, *therefore these actions are stayed as to Charles Roos, IV,* however, there is no action stayed against the Defendants, Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engleman [sic]. (Emphasis added.)

Petitioner's Appendix I, at A-28. Respondent clearly recognized the existence and effect of the automatic stay and that Petitioner was not subject to Respondent's motion for summary judgment.

The Disposition Motion came on for hearing January 19, 1988. Although due notice was given to counsel for Roos Trust, no appearance was made on its behalf. At that hearing, the court entered judgment against Roos

Trust only, not against any individual partner. *See*, Petitioner's Appendix A, at A-1; Petitioner's Appendix B, at A-4.

Petitioner's Chapter 12 bankruptcy case was dismissed, effective February 20, 1988, pursuant to the order of the Bankruptcy Court for the Eastern District of Oklahoma. After the dismissal of Petitioner's Chapter 12 bankruptcy case, Respondent, at the Murray County court's direction, prepared a "Supplemental Judgment" reflecting the Murray County court's findings and judgment at the January 19, 1988, hearing. *See*, Petitioner's Appendix A, at A-1; Petitioner's Appendix B, at A-3-A-4.

To enforce its judgment against Roos Trust, Respondent served an "Order to Appear and Answer as to Assets" ("Order to Appear") on Petitioner. Service was obtained on June 3, 1988.

In discussing the Order to Appear, Petitioner states, in his Brief-in-Chief to the Oklahoma Supreme Court:

> The Order to Appear and Answer as to Assets was directed against Mr. Roos [Petitioner], individually. The Order directed the Private Process Server to notify Mr. Roos to appear as follows:
>
> > To the Defendant, R. Charles Roos, IV, partner of Roos Trust, it appearing to the Court by verified petition that the judgment entered in the above entitled cause has not been satisfied;
> >
> > It is by the Court ordered that *you*, be and appear in person . . . *to answer regarding your ability to respond to the judgment and pay same.*

> *You*, the Defendant, *Robert Charles Roos, IV*, Partner of Roos Trust, *are hereby restrained and enjoined from mortgaging, encumbering, alienating, transferring or otherwise disposing of any property, except reasonable and necessary payment of expenses and indebtedness until further Order of this Court.* (Emphasis added.)
>
> The Order is clear in reflecting BancFirst's [Respondent] intent to pursue its judgment against Mr. Roos, individually. The Order is not limited to the assets of the alleged partnership, but instead refers directly to Mr. Roos and his ability to satisfy the Judgment.

Petitioner's Appendix I, at A-29-A-30.

Petitioner participated in the hearing on assets pursuant to the Order to Appear without raising any objection whatsoever. However, on July 20, 1992, Petitioner filed an action in the United States District Court for the Eastern District of Oklahoma ("Eastern District Action") claiming that Respondent violated the automatic stay by issuing the Order to Appear and holding the hearing on assets. *See*, Appendix C, at App. 10, para. 12, and at App. 12, para. 15. In the Eastern District Action, Petitioner claimed damages from the alleged violation of the stay. *See*, Appendix C, at App. 12, para. 18, at App. 13, para. 22, at App. 13-App. 14, para. 24, and at App. 14, para. 26.

Although the Order to Appear, in Petitioner's own words, was clear as to Respondent's alleged intent to pursue Petitioner individually, Petitioner took no action for three years to remedy the alleged stay violation. Then, on April 25, 1991, Petitioner filed a Motion to Vacate the Supplemental Judgment.

SUMMARY OF THE ARGUMENTS

Respondent did not violate the automatic stay. Respondent's only action in the state court proceeding during the pendency of Petitioner's bankruptcy case was to ask for a ruling on its summary judgment motion against entities not in bankruptcy. In so doing, Respondent specifically advised the state court that Petitioner was protected by the automatic stay. Respondent neither sought, nor obtained, relief against Petitioner.

Even if there had been a stay violation, Petitioner is barred from relief by the equitable doctrines of laches and waiver, due to the delay of over three years between the allegedly offending acts and Petitioner's first request for relief.

Had Petitioner promptly asserted the alleged violation of the stay, Respondent could have taken appropriate action to mitigate the damages, if any, from the alleged stay violation and avoided years of litigation with Petitioner.

ARGUMENT

I.

RESPONDENT DID NOT VIOLATE THE AUTOMATIC STAY

After Petitioner's Chapter 12 bankruptcy was filed, on December 16, 1987, Respondent filed its Disposition Motion in the Murray County Action. Filing this motion was the only action Respondent took in the state court case during the pendency of Petitioner's bankruptcy case.

In the Disposition Motion, Respondent expressly moved for disposition of the case only as against entities not in bankruptcy. Further, Respondent's motion specifically advised the state court of the pendency of the bankruptcy case and the automatic stay's protection of Petitioner. Petitioner lacks even a colorable argument that Respondent violated the automatic stay.

Moreover, the judgment entered was not against Petitioner, but was only against the Roos Trust partnership, which was not in bankruptcy and was not protected by the automatic stay. Thus, the judgment against Roos Trust did not violate the automatic stay.

For bankruptcy purposes, it is well settled that a partnership is an entity separate and distinct from its individual partners. *Liberty Nat. Bank of Roanoke, Va. v. Bear*, 276 U.S. 215, 220, 221, 48 S.Ct. 252, 254 (1928); *In re Aboussie Bros. Const. Co.*, 8 B.R. 302, 303 (E.D.Mo. 1981); *In re Cardinal Industries, Inc.*, 105 B.R. 834, 848-849 (Bankr.S.D.Ohio 1989). Thus, an action may be prosecuted against a partnership even though a general partner is in bankruptcy. *In re Cardinal Industries, Inc., supra*, at 849; *In re Dreske (Dominican Fathers of Winona v. Dreske)*, 25 B.R. 268, 271 (Bankr.E.D.Wis. 1982). The benefits of the automatic stay are clearly restricted to the bankruptcy debtor, and do not extend to other entities who are not in bankruptcy. *See, In re Spencer*, 123 B.R. 858, 860 (Bankr.N.D.Cal. 1991); *Matter of GEC Industries, Inc.*, 116 B.R. 932, 933 (Bankr.D.Del. 1990).

Petitioner cites numerous cases for the proposition that the stay of 11 U.S.C. § 362[1] may, in unusual circumstances, apply to non-debtor third parties. *See,* Petitioner's Writ for Certiorari ("Petition") at 12-13. However, the cases on which Petitioner relies are not applicable here.

In each of the cases on which Petitioner relies, immediately after the offensive act, the debtor moved the bankruptcy court to enjoin the offending action. In none of the cases was there a three-year delay between the offending action and the request for relief.

Moreover, the cases discuss the issue in terms of extending the protection of the stay or enjoining the offending act under the power of § 362. When discussing extension of § 362 to protect non-debtors, the courts do not take the position that the stay has been violated, but rather, that it should be extended to cover the third parties. Consequently, the stay is not automatically in place to prohibit acts against non-debtor third parties; injunctive relief must be specifically extended to cover them.

Finally, several of the cases cited do not rely on § 362 to stay the action against the non-debtor. These cases clearly, and more appropriately, rely on the provisions of § 105 to enjoin certain actions by a creditor against a non-debtor. *See, In re MacDonald/Associates, Inc.*, 54 B.R. 865 (Bankr.D.R.I. 1985) (Request for preliminary injunction; § 362 not involved); *In re Lion Capital Group*, 44 B.R. 690

---

[1] Unless otherwise specified, all statutory references will be to the United States Bankruptcy Code, Title 11, United States Code.

(Bankr.S.D.N.Y. 1984) (Did not involve § 362 but, rather, a request for preliminary injunction); *In re Metal Center, Inc.*, 31 B.R. 458 (Bankr.D.Conn. 1983) (Extension of stay of § 362 not appropriate); *In re Johns-Manville Corp.*, 26 B.R. 420 (Bankr.S.D.N.Y. 1983) (Extended the application of § 362 under authority of § 105.)

Here, there was no violation of the § 362 stay. The Disposition Motion clearly acknowledged that any action against Petitioner was stayed. Moreover, the only judgment entered was against the Roos Trust partnership, not against any of the partners.

II.

PETITIONER'S COMPLAINT OF ALLEGED AUTOMATIC STAY VIOLATIONS IS BARRED BY THE EQUITABLE DOCTRINES OF LACHES AND WAIVER

If there had been stay violations, Petitioner would be barred by the equitable doctrines of laches and waiver from complaining. Equitable principles, such as the doctrines of laches and waiver, apply to claimed violations of the automatic stay. *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990) ("[E]quitable principles may, in some circumstances, be applicable to claimed violations of the stay."); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984) ("Suspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when

equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems."); *In re Continental Air Lines, Inc.*, 61 B.R. 758, 780 (S.D.Tex. 1986) ("[A] bankruptcy court must be guided by equitable principles in exercising its discretion to enforce or modify the automatic stay."); *In re Downing*, 141 B.R. 748 (Bankr.N.D.Okla. 1992) (Bankruptcy court refused to avoid a post-petition judgment on equitable grounds.).

Petitioner complains that Respondent violated the automatic stay by filing its Disposition Motion on December 16, 1987. Petitioner complains that the Oklahoma Court's judgment of January 19, 1988, violated the automatic stay. Significantly, Petitioner did not raise any suggestion of a stay violation throughout the entire relevant period, either with Respondent's counsel, the state court, or the bankruptcy court.

Petitioner was served with the Order to Appear on June 3, 1988. In accordance with that order, Respondent conducted the hearing on assets. Although Petitioner claims the Order to Appear, "is clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually," Petitioner participated in the hearing on assets and did not complain of a stay violation. Then, approximately three years later, Petitioner began asserting that the judgment was taken in violation of the automatic stay and that the Order to Appear and hearing on assets were violative of the automatic stay.

At least two points are noteworthy. First, Petitioner asserts that the Order to Appear, by its express terms, "is

clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually." Petitioner's Appendix I, at A-30. Consequently, by his own explicit admission, Petitioner had notice of Respondent's alleged intent to enforce the Supplemental Judgment against him in his individual capacity, at the very latest, upon service on June 3, 1988, of the Order to Appear.

Second, this statement was made in Petitioner's brief filed with the Oklahoma Supreme Court on November 26, 1991. In his Petition filed with this Court, Petitioner asserts that he first learned of Respondent's alleged intent to pursue the Supplemental Judgment against him individually at a trial held in January 1991. *See*, Petition at 5. But in November 1991, ten months after the January 1991 trial, Petitioner asserted before the Oklahoma Supreme Court that the Order to Appear served on June 3, 1988, by its own terms, was clear as to Respondent's alleged intent to pursue Petitioner individually. No mention is made in Petitioner's Brief-in-Chief of the revelation of Respondent's alleged intent at the January 1991 trial.

Petitioner has argued throughout this case that Petitioner's bankruptcy case remained operative until June 20, 1988. Actually, the bankruptcy court dismissed the case effective February 1988, and the June 20 date relates to the administrative closing of the case. If the bankruptcy case was pending well after Petitioner, by his own admission, was placed on clear notice on June 3, 1988, of a stay violation by Respondent, Petitioner should have raised the issue in the bankruptcy court.

Even after dismissal of the bankruptcy case, it could have been timely reopened to seek redress for a stay violation. 11 U.S.C. § 350(b). Indeed, eventually, some four years after the bankruptcy case's dismissal, Petitioner unsuccessfully sought to reopen the bankruptcy case for that exact purpose.

If Petitioner had timely asserted the claimed stay violation, Respondent could have taken any appropriate steps to mitigate any damages Petitioner claims to have suffered and protect itself from the ensuing years of litigation with Petitioner over this issue. However, Petitioner "hid behind the log" to see what result related litigation would bring. Only when advantageous for Petitioner did he assert the claimed violation of the stay.

Petitioner's explanation for this three-year delay in acting on the alleged stay violation contradicts his statement regarding the Order to Appear. The reason Petitioner gives for the delay is that he first learned of Respondent's alleged intent at a January 1991 trial. *See*, Petition, at 5. But this statement contradicts his subsequent statement to the Oklahoma Supreme Court that the Order to Appear, "is clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually."

Due to Petitioner's unexcused delay in asserting the claimed violation of the stay, Petitioner's claims should be denied under the equitable doctrines of laches and waiver, and certiorari should not be granted.

III.

SUMMARY REVERSAL WOULD BE INAPPROPRIATE

Petitioner requests summary reversal of the Oklahoma courts' decisions. However, this relief would be inappropriate.

As previously noted, the issues are not nearly as simple or pristine as Petitioner asserts. A number of questions are relevant. What is the effect of Respondent's express statement in the Disposition Motion that the state court action was stayed against Petitioner? Is it violative of the automatic stay for a creditor to take judgment against a partnership which has a general partner in bankruptcy? What is the effect of a bankruptcy debtor's failure to timely raise an alleged violation of the automatic stay and to "hide behind the log" until it becomes advantageous to the debtor to assert the stay as a sword, rather than the shield the Bankruptcy Code intends it to be?

Without considering and addressing each of these factual and legal issues, meaningful review would be impossible. Accordingly, summary reversal of the Oklahoma courts' decisions would be inappropriate.

CONCLUSION

There was no stay violation. Moreover, if a stay violation had occurred, Petitioner unjustifiably waited three years before requesting relief. Thus, certiorari to the Oklahoma Supreme Court should not issue.

Respondent requests that Petitioner's request for summary reversal be denied and that Petitioner's request for a writ of certiorari to the Supreme Court of the State of Oklahoma be denied.

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Bancfirst of Sulphur, Oklahoma

APPENDIX A

IN THE DISTRICT COURT

FIRST OKLA. BANK AND TRUST COMPANY OF SULPHUR Plaintiff(s) vs. ROOS TRUST ET AL Defendant(s)	No. C-85-147 (Filed Sep. 30, 1986)

COURT MINUTE

SEPT. 30, 1986

PLTF. APPEARS BY AND THROUGH ITS ATTORNEY, JOHN B. AXTON AND DEFENDANTS APPEAR BY AND THROUGH THEIR ATTORNEY, KENNETH M. SMITH. THE MATTER COMES ON FOR HEARING ON MOTIONS FOR SUMMARY JUDGMENT FILED BY BOTH PARTIES.

THE COURT HAVING REVIEWED THE MOTIONS, AFFIDAVITS, EXHIBITS, DEPOSITIONS AND HEARD ARGUEMENT [sic] OF COUNSEL FINDS PURSUANT TO RULE 13 THAT THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO PARAGRAPHS 1, 2, 3, AND 4 OF ITS RESPONSE TO AND MOTION FOR SUMMARY JUDGMENT. THE CASE IS STRICKEN FROM ITS PRESENT TRIAL SETTING OF OCTOBER 7, 1986, AND THE PARTIES SUBMIT FURTHER AUTHORITIES AND AMENDMENTS TO PLEADINGS AS TO THE

LIABILITY OF ROOS TRUST A PARTNERSHIP COMPOSED OF RUBY L. ROOS, ROBERT C [sic] ROOS THE IV AND ELIZABETH A [sic] ROOS. PLAINTIFF TO PREPARE THE JOURNAL ENTRY OF JUDGMENT.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

/s/ Tim Colbert

APPENDIX B

IN THE DISTRICT COURT WITHIN
AND FOR MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA BANK & TRUST COMPANY, Sulphur, Oklahoma, a banking corporation,	)	
Plaintiff,	)	Case No. 85-147
v.	)	(Filed
RUBY LOUISE ROOS TRUST, ROBERT CHARLES ROOS IV, TRUST and ELIZABETH ANN ROSS [sic] TRUST, All by the trust instrument dated June 1, 1964, by and through, R. CHARLES ROOS III, Trustee,	)	Oct. 17, 1986)
Defendants,	)	
v.	)	
ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN; and R. CHARLES ROOS III, individually,	)	
Additional Party Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

Now on this 30th day of September, 1986, this matter comes on for hearing upon the Motions for Summary

Judgment filed by both parties herein. The Plaintiff appeared by and through its Attorney, JOHN B. AXTON, of the law firm of MAYHUE, AXTON & YOUNGBLOOD and the Defendants appeared by and through their attorney, KENNETH M. SMITH, of the law firm ROBINSON, BOESE & DAVIDSON.

The Court having reviewed the Motions, Affidavits, Exhibits, Depositions and heard argument of counsel finds pursuant to Rule 13 that Plaintiff is entitled to Summary Judgment as follows:

The Court FINDS AND IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that:

1. That the Plaintiff be, and it is hereby, awarded a judgment against the Defendants, R. Charles Roos III as Trustee for Ruby Louise Roos Trust, Robert Charles Roos IV Trust and Elizabeth Ann Roos Trust and R. Charles Roos III a/k/a Robert Charles Roos III, individually, in the principal amount of $318,005.00 as of August 25, 1986; interest in the amount of $66,481.60; interest accruing at the rate of $91.48 per diem; costs of this action of $588.00, for a total judgment of $385.074.60 [sic] with interest thereon at the statutory rate of 15% per annum and a reasonable attorney's fee.

2. That the Defendants, R. Charles Roos II [sic] as Trustee for Ruby Louise Roos Trust, Robert Charles Roos IV Trust and Elizabeth Ann Roos Trust are liable on the note sued upon.

3. That the Court has heretofore found on the 25th day of August, 1986, that the Plaintiff was entitled to judgment against R. Charles Roos III, individually, on his

guarantee in the amount set forth in paragraph "1." above.

4. That the case is stricken from its present trial setting of October 7, 1986.

5. Further, that the parties may submit further authorities and amendments to pleadings as to the liability of Roos Trust a partnership composed of Ruby L. Roos, Robert C. Roos IV and Elizabeth A. Roos.

/s/ Timothy Colbert
JUDGE OF THE DISTRICT COURT

APPROVED:

/s/ John B. Axton
JOHN B. AXTON
MAYHUE, AXTON & YOUNGBLOOD
Attorneys for Plaintiff

/s/ Kenneth M. Smith
Kenneth M. Smith
ROBINSON, BOESE, & DAVIDSON
Attorneys for Defendants

[JE,ROOS/FOBS5]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

ROBERT CHARLES ROOS, IV, Individually, and ROOS RANCH, INC., an Oklahoma Corporation,	)	Case No. _____
Plaintiffs,	)	CIV 92-450-NJ
v.	)	(Filed July 20, 1992)
BANCFIRST-SULPHUR, successor to FIRST OKLAHOMA BANK & TRUST COMPANY OF SULPHUR, OKLAHOMA, Branch of BANCFIRST-OKLAHOMA CITY, OKLAHOMA, Member of BANCFIRST CORPORATION,	)	
Defendant.	)	

COMPLAINT

Plaintiffs, Robert Charles Roos IV and Roos Ranch, Inc., an Oklahoma corporation, hereby file this Complaint against the above referenced Defendant for Defendant's tortious interference with Plaintiffs' business opportunities and business contracts, and through wrongful actions in obtaining a Supplemental Judgment and attempting execution thereon, have tortiously interfered with prospective economic advantage and Plaintiffs' business, and in support, allege and state as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Robert Charles Roos, IV ("Roos IV") is a citizen and resident of the State of Oklahoma. Roos IV and his wife, Frances M. Roos, were debtors in a Chapter 12 bankruptcy proceeding from February 6, 1987 to June 20, 1988.

Plaintiff, Roos Ranch, Inc., an Oklahoma corporation, is an entity wherein Roos IV is the majority stockholder, owning more than fifty percent of the outstanding stock of the corporation. The remaining stock is owned by Louise R. Whittenburg, of San Antonio, Texas, and Elizabeth R. Engelman, of Wescliffe, Colorado.

2. Defendant, BancFirst-Sulphur ("BancFirst"), is an Oklahoma banking corporation. Its registered service agent is David E. Rainbolt, 101 North Broadway, Oklahoma City, Oklahoma 73102. BancFirst filed a Proof of Claim against the Roos IV bankruptcy estate on March 17, 1987.

3. Accordingly, this Court has jurisdiction and venue over the parties to this proceeding. *See* 28 U.S.C. § 157(b) and § 1334 and 11 U.S.C. § 362.

BACKGROUND OF THE CASE

4. On February 6, 1987, Roos IV filed his voluntary Chapter 12 bankruptcy petition with the United States Bankruptcy Court for the Eastern District of Oklahoma. An automatic stay was imposed against creditors proceeding against the Debtor pursuant to 11 U.S.C. § 362. A Final Decree closing the Chapter 12 proceeding was entered on June 20, 1988.

5. BancFirst originally held a Promissory Note, dated November 2, 1984, from R. Charles Roos, III, as Trustee of three Trusts, known as the Ruby Louise Roos Trust, Robert Charles Roos, IV Trust and Elizabeth Ann Roos Trust. The three Trusts were created by one Trust Agreement, dated June 1, 1964. *See* attached Exhibit A. The Trust Agreement specifically provided that the beneficiaries would not be liable for the acts of the Trustee, BancFirst obtained a judgment against R. Charles Roos, III, individually, and as Trustee of the three Trusts on September 30, 1986 in an action pending before the Murray District Court ("Murray County Action"). *See* attached Exhibit B.

6. BancFirst created a fictional defendant entity for purposes of the Murray County Action. This fictional entity was identified by BancFirst as Roos Trust, a partnership of the three individual beneficiaries of the above referenced Trusts, being Ruby Louise Roos Whittenburg, Roos IV and Elizabeth Ann Roos Engelman. The alleged partners to this fictional partnership have continually denied the very existence of the BancFirst created entity.

7. On March 17, 1987, BancFirst filed a Proof-of-Claim against Roos IV bankruptcy estate, based on the judgment of September 30, 1986 against R. Charles Roos, III, individually, and as Trustee for the three Trusts ("Proof-of-Claim"). *See* attached Exhibit C. BancFirst's Proof-of-Claim, was filed as its claim for individual liability owed from Roos IV to BancFirst.

8. Over a year after obtaining the September 30, 1986 judgment against its only obligors, and while Roos IV's bankruptcy was pending, Bancfirst [sic] filed a

Motion for Disposition of Pending Motion for Summary Judgment, on December 16, 1987, in the Murray County Action. In the Motion, BancFirst sought to obtain judgment against Roos Trust, a partnership of the three individual beneficiaries. The Motion was filed during the pendency of Roos IV's bankruptcy proceeding and provided as follows:

> That Charles Roos, IV has filed Chapter 12 bankruptcy in Case No. 87-00148-BKC-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, *therefore these actions are stayed as to Charles Roos, IV,* however, there is no action stayed against the Defendants Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman.

Emphasis added.

BancFirst has subsequently admitted that service was never obtained against Ruby Louis Roos Whittenburg or Elizabeth Ann Roos Engelman. Roos IV, the only alleged partner served in this proceedings [sic], was in bankruptcy at this time and protected by the automatic stay of 11 U.S.C. § 362.

9. On January 19, 1988, BancFirst appeared at a hearing before the Murray County District Court and obtained a default judgment aginst the fictional partnership and its alleged partners. No appearance was made for the Defendants at the hearing. In the Minute Order from the hearing, the Court found as follows:

> The Court finds that in fact Roos Trust is a partnership consisting of three individuals, and the three individuals being Ruby Louise Roos Whittenburg, Elizabeth Ann Roos Engelman and

> Robert Charles Roos, IV. The Court therefore grants the Motion for Summary Judgment against said partnership. John Axton to prepare J.E.

See attached Exhibit D.

10. Thereafter, John Axton as attorney for BancFirst, without serving the three individuals, memorialized the January 19, 1988 Minute Order by submitting a Supplemental Journal Entry of Judgment to the Murray County District Court (hereinafter referred to as the "Supplemental Judgment"). *See* attached Exhibit E. The Supplement [sic] Judgment filed March 1, 1988, was not approved by the three individuals, nor their attorneys. Neither the "Minute Order" nor the Supplemental Judgment reflects the lack of service upon Ruby Louise Roos Whittenburg and Elizabeth Ann Engelman, or that any action against Roos IV was stayed by his Chapter 12 bankruptcy proceeding.

11. BancFirst violated the automatic stay of U.S.C. § 362 [sic] by failing to modify the stay prior to obtaining the Supplemental Judgment against Roos Trust, a partnership of the three individual beneficiaries.

12. In a continuing stay violation, BancFirst applied to the Murray County District Court for an Order for Roos Trust to Appear and Disclose Assets as to the Supplemental Judgment. The Order was entered and served on Roos IV during the pendency of Roos IV's bankruptcy proceeding and directed Roos IV, as an individual, to appear as follows:

> To the Defendant, R. Charles Roos, IV, partner of Roos Trust, it appearing to the Court by verified

> petition that the judgment entered in the above entitled cause has not been satisfied, it is by the Court that *you* be and appear in person . . . to answer regarding *your ability to respond to the judgment and pay the same.*
>
> *You* Defendant, Robert Charles Roos, IV, partner of Roos Trust, *are hereby restrained and enjoined from mortgaging, encumbering, alienating, transferring or otherwise disposing of any property except reasonable and necessary payment of expenses and indebtedness until further order of this Court.*

See attached Exhibit F (emphasis added).

13. Thereafter, BancFirst continued its wrongful execution attempts by directing the Murray County District Court Clerk to issue two Writs of Execution, both filed September 27, 1991. *See* attached Exhibits G and H. The Writs are substantially in error as they direct the Murray Country Sheriff to levy execution against the fictitious Roos Trust, a partnership of the three individual beneficiaries and Roos IV, but referred only to the September 30, 1986 judgment which was limited to being against R. Charles Roos, III, individually and as Trustees of the three Trusts. The September 30, 1986 judgment in no way affected either the fictional Roos Trust partnership of the three individual beneficiaries or Roos IV.

14. The Supplemental Judgment of January 19, 1988 taken against Roos IV while he was in a Chapter 12 bankruptcy proceeding, is void and of no effect, as the Murray County District Court lacked personal or subject matter jurisdiction to enter a judgment effecting [sic] Roos IV's rights.

15. BancFirst knowingly and intentionally violated the automatic stay of Roos IV's bankruptcy proceeding by obtaining the Supplemental Judgment. The stay violation was exacerbated by BancFirst's attempted execution of the Supplemental Judgment prior to the closing of Roos IV's bankruptcy proceeding.

16. BancFirst's wrongful refusal to release the Supplemental Judgment against Roos IV, coupled with its Writs of Execution filed September 27, 1991, have caused material, substantial and continuing damages to Roos IV and Roos Ranch, Inc.'s business activities, including but not limited to the inability to acquire cattle operation financing resulting in partial liquidation. Additionally, opportunities were lost by Roos IV and Roos Ranch, Inc. as a result of BancFirst's actions relating to the Supplemental Judgment.

FIRST CAUSE OF ACTION

17. Plaintiffs reallege and restate paragraphs 1 through 16 herein.

18. BancFirst knowingly and intentionally violated the automatic stay of Roos IV's bankruptcy proceeding by taking the Supplemental Judgment and attempting execution thereon. Roos IV is entitled to recover actual and punitive damages and costs including a reasonable attorney fee pursuant to 11 U.S.C. § 362(h).

SECOND CAUSE OF ACTION

19. Plaintiffs reallege and restate paragraphs 1 through 18 herein.

20. BancFirst knowingly and recklessly published its assertion of Roos IV's individual liability on the Supplemental Judgment, and continues to disregard the April 8, 1992 Order of the United States Bankruptcy Court for the Eastern District of Oklahoma, in which BancFirst was ordered to withdraw the Writs of Execution as against Roos IV, as well as to refrain from seeking to enforce the Supplemental Judgment against Roos IV individually (*see* attached Exhibit I), causing continuing harm and damage to Plaintiffs and their businesses, including, but not limited to, lost business opportunities.

THIRD CAUSE OF ACTION

21. Plaintiffs reallege and restate paragraphs 1 through 20 herein.

22. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously damaged, and continue to tortiously damage, Plaintiffs' present and future business opportunities, entitling Plaintiffs to recovery for BancFirst's tortious interference with business opportunities.

FOURTH CAUSE OF ACTION

23. Plaintiffs reallege and restate paragraphs 1 through 22 herein.

24. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously interfered, and continue to tortiously interfere, with Plaintiffs' existing contracts. Plaintiffs are entitled to

recovery for BancFirst's tortious interference with contracts.

FIFTH CAUSE OF ACTION

25. Plaintiffs reallege and restate paragraphs 1 through 24 herein.

26. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously interfered, and continue to tortiously interfere, with Plaintiffs' prospective economic advantage.

WHEREFORE, Plaintiffs pray for judgment in their favor and against BancFirst finding that BancFirst's action in obtaining the Supplemental Judgment and the execution thereon were in violation of 11 U.S.C., [sic] § 362, and that BancFirst has tortiously interfered with Plaintiffs' business, business opportunities, contractual relationships, and prospective economic advantage, thereby entitling Plaintiffs to an award as follows:

a. Actual damages in an amount in excess of $1,000,000.00 and punitive damages of $2,500,000.00. [sic]

b. Pre [sic] and post-judgment interest according to law;

c. All costs, including a reasonable attorney's fee; and

d. All other equitable relief which this Court may award under the circumstances of this proceeding.

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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